RECORD AND BRIEFS

Supreme Court, U.S.
FILED
DEC 13 2016
OFFICE OF THE CLERK

No. 16-405

IN THE

Supreme Court of the United States

BNSF RAILWAY COMPANY,

Petitioner,

v.

KELLI TYRRELL, as Special Administrator for the Estate of Brent T. Tyrrell; and ROBERT M. NELSON,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Montana

REPLY BRIEF FOR PETITIONER

ANDREW S. TULUMELLO
Counsel of Record
MICHAEL R. HUSTON
CHAD R. MIZELLE
SEAN J. COOKSEY
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, NW
Washington, DC 20036
(202) 955-8500
atulumello@gibsondunn.com

Counsel for Petitioner BNSF Railway Company

RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

TABLE OF CONTENTS

Page

RULE 29.6 STATEMENT i

TABLE OF AUTHORITIES iii

REPLY BRIEF FOR PETITIONER 1

I. The Montana Supreme Court's Opinion Is Unfaithful To *Daimler* And Splits With Multiple Other Courts 1

A. The Montana Supreme Court's Reading Of *Daimler* Creates A Deep Split 2

B. Courts Are Starkly Divided Over The Meaning Of FELA 3

II. The Montana Supreme Court's Opinion Is Egregiously Wrong 5

III. This Case Is Extremely Important, And A Grant, Vacate, And Remand Will Not Suffice 10

CONCLUSION 12

TABLE OF AUTHORITIES

Page(s)

Cases

Baltimore & Ohio R.R. Co. v. Kepner,
314 U.S. 44 (1941) 5, 7

Bond v. United States,
134 S. Ct. 2077 (2014) 8

Daimler AG v. Bauman,
134 S. Ct. 746 (2014) 1, 7

Denver & Rio Grande W. R.R. Co. v. Terte,
284 U.S. 284 (1932) 6, 7

Gratz v. Bollinger,
539 U.S. 244 (2003) 9

Hayman v. S. Pac. Co.,
278 S.W.2d 749 (Mo. 1955) 4

Hillside Dairy Inc. v. Lyons,
539 U.S. 59 (2003) 9

Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee,
456 U.S. 694 (1982) 7

Int'l Shoe Co. v. Washington,
326 U.S. 310 (1945) 7

J. McIntyre Mach., Ltd. v. Nicastro,
564 U.S. 873 (2011) 9

MacKinnon v. St. Louis S.W. Ry. Co.,
518 So. 2d 89 (Ala. 1987) 4

McKnett v. St. Louis & S.F. Ry. Co.,
292 U.S. 230 (1934) 7

Miles v. Ill. Cent. R.R. Co.,
315 U.S. 698 (1942) 7

Miss. Univ. for Women v. Hogan,
458 U.S. 718 (1982) 9

Norfolk S. Ry. Co. v. Maynard,
437 S.E.2d 277 (W. Va. 1993) 4

Obergefell v. Hodges,
135 S. Ct. 2584 (2015) 9

Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.,
484 U.S. 97 (1987) 8

Pope v. Atl. Coast Line R.R. Co.,
345 U.S. 379 (1953) 7

S. Pac. Transp. Co v. Fox,
609 So. 2d 357 (Miss. 1992) 4

Second Employers' Liability Cases,
223 U.S. 1 (1912) 6

Steel Co. v. Citizens for a Better Env't,
523 U.S. 83 (1998) 7

Tackett v. Duncan,
334 P.3d 920 (Mont. 2014) 3

United States v. Gonzales,
520 U.S. 1 (1997) 6

World-Wide Volkswagen Corp. v. Woodson,
444 U.S. 286 (1980) 10

Statutes

45 U.S.C. § 56 ..... 3, 6, 8

Rules

Fed. R. Civ. P. 4(k)(1) 8

REPLY BRIEF FOR PETITIONER

This Court's holding in *Daimler AG v. Bauman* is under assault. 134 S. Ct. 746 (2014). The Montana Supreme Court explicitly refused to apply *Daimler*, and it created direct splits with other courts, when it authorized personal jurisdiction over defendants that are not at home in Montana in FELA cases that do not arise in Montana. Respondents attempt to evade these stark conflicts by denying that the Montana Supreme Court meant what it said about *Daimler*, by obfuscating the question presented, by ignoring FELA's plain text, and by misrepresenting this Court's FELA precedents.

The judgment below is egregiously wrong and reversing it will affect more than 170 pending cases in which railroads are subject to abusive and flagrantly unconstitutional forum-shopping.

I. The Montana Supreme Court's Opinion Is Unfaithful To *Daimler* And Splits With Multiple Other Courts

The Montana Supreme Court could not have found general personal jurisdiction over BNSF without explaining why *Daimler*'s at-home rule did not apply. In offering that explanation, the Montana Supreme Court created a split on whether *Daimler* is limited to transnational cases, and it deepened a split on whether FELA authorizes state courts to exercise personal jurisdiction over out-of-state railroads where the Due Process Clause would forbid it. These splits are real and they warrant this Court's review.

A. The Montana Supreme Court's Reading Of *Daimler* Creates A Deep Split

Respondents first contend that the Montana Supreme Court's opinion is not really about general personal jurisdiction "as that term is used in this Court's case law," because the holding below is limited to FELA claims. Br. in Opp. 8–9. But that only highlights the Montana Supreme Court's confusion about this Court's general personal-jurisdiction jurisprudence, which is grounded in the Due Process Clause and does not change based on the state or federal cause of action asserted.

Next, Respondents refuse to defend the Montana Supreme Court's holding that *Daimler* is "factually ... distinguishable," Pet. App. 15a, based on its international context, *see* Pet. App. 11a. This is surprising, because Respondents *asked* the Montana Supreme Court to reach that very conclusion. *See* Pls.' Consolidated Answer Br. in Mont. S. Ct. 34, 36 (arguing that "[e]ven a cursory reading of *Daimler* reveals that the Court's focus was directly on the 'transnational context,'" and "these cases simply do not implicate any of the 'risks to international comity' ... that the Court found to be of such grave concern in *Daimler*").

Instead, Respondents state that the Montana Supreme Court did not actually distinguish *Daimler* based on its transnational facts and thereby create a massive 11-1 split. Br. in Opp. 9–10. Respondents' attempt to walk back the holding they asked for and received is specious. The opinion below expressly states that *Daimler* addressed "the authority of a court in the United States to entertain a claim brought by foreign plaintiffs against a foreign defendant based on events occurring entirely outside the United States," and as such, *Daimler* does not apply to cases under FELA,

which "does not apply to torts that occur in foreign countries." Pet. App. 11a. Future courts will apply the actual language and holding of the Montana Supreme Court's decision, not Respondents' narrowing construction of it.

The Montana Supreme Court's fallacious distinction of *Daimler* is not cured by its opinion two years earlier in *Tackett v. Duncan*, 334 P.3d 920 (Mont. 2014). *Contra* Br. in Opp. 9–10. The *Tackett* court had no reason to discuss the reach of *Daimler*'s holding on general jurisdiction, because the question in *Tackett* was whether the trial court "lacked specific jurisdiction." 334 P.3d at 926. This Court should grant certiorari to resolve the split on the scope of *Daimler* and to prevent artificial distinctions from resurrecting the "doing business" test for general personal jurisdiction.

B. Courts Are Starkly Divided Over The Meaning Of FELA

There is no merit to Respondents' assertion that 45 U.S.C. § 56 authorizes state courts to exercise personal jurisdiction over out-of-state railroads in FELA cases, or that there is no conflict on this question. Br. in Opp. 1–2. The split between the Montana Supreme Court and multiple other courts over FELA's meaning is stark, and it produces conflicting jurisdictional outcomes depending on the forum.

The Montana Supreme Court held that personal jurisdiction in FELA cases requires affirmative answers to two questions: (1) Is the defendant "doing business" in the forum state, and (2) Has the plaintiff satisfied the forum's long-arm statute? Pet. App. 13a, 17a. According to that court, if the answer to both questions is yes, then there is no need for the at-home analysis under the Due Process Clause, *see* Pet. App.

18a–19a, because "Congress drafted the FELA to make a railroad 'at home' for jurisdictional purposes wherever it is 'doing business,'" Pet. App. 12a. The Alabama Supreme Court agrees: It holds that so long as the defendant is "doing business" in Alabama and can satisfy the Alabama long-arm statute, no consideration of due process is required. *MacKinnon v. St. Louis Sw. Ry. Co.*, 518 So. 2d 89, 93 (Ala. 1987).

But other courts do not agree. In sharp contrast to the Montana Supreme Court's holding that "FELA confer[s] [personal] jurisdiction to state courts," Pet. App. 9a, the Mississippi Supreme Court holds that "Section 56 speaks to venue of actions in federal courts, not personal jurisdiction in state courts," and that "[n]othing in the act addresses the matter of personal jurisdiction in the state court." *S. Pac. Transp. Co v. Fox*, 609 So. 2d 357, 362–63 (Miss. 1992). And whereas the Montana Supreme Court interpreted "the 'concurrent jurisdiction' conferred upon the state and federal courts" by Section 56 to include "personal jurisdiction," Pet. App. 14a, *Fox* holds that "concurrent federal and state jurisdiction ... refers to subject matter jurisdiction." 609 So. 2d at 362.

Similarly, the Missouri Supreme Court holds that Section 56 "refers to suits in the United States District Courts and is not applicable" to cases in state court. *Hayman v. S. Pac. Co.*, 278 S.W.2d 749, 751 (Mo. 1955). The Missouri Supreme Court thus holds that, even where the railroad is doing business in the forum and the long-arm statute is satisfied, "the state must acquire jurisdiction over the defendant" under due-process principles. *Id.* The West Virginia Supreme Court of Appeals likewise holds that "a FELA plaintiff is limited" by "the requirements for *in personam* jurisdiction outlined in *International Shoe*." *Norfolk S. Ry.*

Co. v. Maynard, 437 S.E.2d 277, 280–81 (W. Va. 1993).

Respondents contend that these state-court opinions are irrelevant because they interpreted state long-arm statutes, not FELA. Br. in Opp. 13–15. That is misdirection. These courts hold that FELA does not address personal jurisdiction in state courts, and that they apply this Court's due-process analysis (which is now *Daimler*'s at-home rule) before accepting general personal jurisdiction, whereas the Montana Supreme Court held that FELA makes *Daimler* completely inapplicable.

The fact that these courts agree on the unremarkable proposition that a plaintiff must also satisfy the state long-arm statute to bring a FELA claim, *see* Br. in Opp. 2, does not negate the obvious and important split over the question presented here: Whether FELA confers general personal jurisdiction on state courts even where the Due Process Clause and *Daimler*'s at-home rule would forbid it.

II. The Montana Supreme Court's Opinion Is Egregiously Wrong

A. Respondents grievously misread Section 56 in asserting that it permits "an expansive set of federal *and state* courts to serve as proper venues *and to exercise personal jurisdiction* over railroads in FELA cases." Br. in Opp. 1 (emphasis added). Respondents' reliance on *Baltimore & Ohio Railroad Co. v. Kepner*, 314 U.S. 44, 50 (1941), is utterly misplaced: *Kepner* held definitively that Section 56 "establishes *venue* for an action in the *federal courts*." 314 U.S. at 52 (emphasis added). The statute has nothing to do with personal jurisdiction in a state court, and no case from this Court has ever held otherwise.

As for Section 56's "concurrent" jurisdiction clause, this Court long ago explained that it refers only to state courts' subject-matter jurisdiction, and does not "enlarge or regulate the jurisdiction of state courts." *Second Employers' Liability Cases*, 223 U.S. 1, 55–56 (1912). Respondents do not attempt to defend the Montana Supreme Court's holding that "concurrent" jurisdiction encompasses personal jurisdiction, Pet. App. 14a, a holding that is contrary to this Court's decisions dating back *centuries*, Pet. 22. Respondents' unwillingness to defend the textual basis invoked by the Montana Supreme Court to support its interpretation of Section 56 speaks volumes.

Indeed, Respondents never give meaningful attention to the text of 45 U.S.C. § 56. Instead, they resort to the least-persuasive type of legislative history—floor statements by a single Senator that were mentioned in *Kepner*. Br. in Opp. 3–4, 19. The attempt to substitute legislative history for textual analysis is compelling evidence that the Montana Supreme Court's statutory interpretation (and thus, its judgment) is wrong. "Given the straightforward statutory command, there is no reason to resort to legislative history." *United States v. Gonzales*, 520 U.S. 1, 6 (1997).

Respondents also contend that this Court has endorsed the Montana Supreme Court's interpretation of Section 56. Br. in Opp. 15–17. As BNSF already has demonstrated, Pet. 19–20, this argument is spectacularly wrong: Not one of the cases cited by Respondents discussed personal jurisdiction under the Due Process Clause. The defendants in *Denver & Rio Grande Western Railroad Co. v. Terte*, 284 U.S. 284 (1932), raised a series of objections, including based on "an undue burden on interstate commerce ... and

the Fourteenth Amendment," *id.* at 285, but this Court's opinion was based solely on precedents applying the Dormant Commerce Clause, *id.* at 287–88. The defendant in *McKnett v. St. Louis & San Francisco Railway Co.*, 292 U.S. 230 (1934), objected that the state court lacked jurisdiction under state law, *id.* at 230–31. The holdings in *Kepner*, 314 U.S. 44, *Miles v. Illinois Central Railroad Co.*, 315 U.S. 698 (1942), and *Pope v. Atlantic Coast Line Railroad Co.*, 345 U.S. 379 (1953), all concerned state courts' equitable authority to enjoin harassing litigation, as Respondents concede. Br. in Opp. 16–17.

Moreover, all but one of these cases pre-dated *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), which addressed the perceived injustice of an injured railroad employee "be[ing] forced to litigate in a distant forum," Br. in Opp. 3, when it created *specific* personal jurisdiction, abrogating the formalistic territorial rules of the prior era. *See Daimler*, 134 S. Ct. at 753–54. Personal-jurisdiction cases predating *International Shoe* are not entitled to reliance today. *See id.* at 761 n.18. Moreover, any "drive-by jurisdictional rulings" in these cases "have no precedential effect." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998). That rule is particularly forceful in the context of a waivable right like personal jurisdiction. *See Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982).

Respondents also contend that Section 56 must be read to confer personal jurisdiction in a *federal* court where the railroad is doing business, and supposedly it must therefore also confer personal jurisdiction on state courts. Br. in Opp. 18–20. That is a complete *non sequitur*. Section 56 describes where a case may be brought "in a district court of the United States."

45 U.S.C. § 56. Thus, even if Respondents were correct that this provision confers personal jurisdiction on federal courts, it would not matter here, because this case is about personal jurisdiction in *state* courts. Moreover, Respondents are not correct that FELA confers personal jurisdiction in federal courts, which is instead governed by Federal Rule of Civil Procedure 4(k)(1) and the constraints of the Fifth Amendment. *See Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 104–06 (1987).[1]

B. Even if the Montana Supreme Court's construction of FELA were somehow correct, the judgment below must *still* be reversed because Congress does not have the constitutional "power to confer personal jurisdiction on state courts" where the Due Process Clause denies it. *Contra* Br. in Opp. 17. The Montana Supreme Court's contrary conclusion is extraordinary and *by itself* deserves this Court's review.

Respondents contend that *Daimler* did not address whether Congress can override the Fourteenth Amendment, and that there is no split on that issue. Br. in Opp. 12. But "[t]he notion that some things 'go without saying' applies to [law] just as it does to everyday life." *Bond v. United States*, 134 S. Ct. 2077, 2088 (2014). A federal statute plainly cannot create personal jurisdiction in a state court notwithstanding the limitations of the Due Process Clause, and this Court has never needed to enforce that self-evident proposition—until now.

---

[1] BNSF did not concede below that a Montana federal court would have jurisdiction in this case, *contra* Br. in Opp. 19, a question that was not presented. In context, BNSF's reply brief to the Montana Supreme Court acknowledged Section 56's conferral of a right to federal *venue*.

Respondents posit that a plurality of this Court "acknowledge[d]" the power of Congress to alter state courts' personal jurisdiction in *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873, 885 (2011). Br. in Opp. 17–18. That is preposterous. Just two sentences after the passage Respondents quote, the *Nicastro* plurality was clear that it referred to a hypothetical statute "authoriz[ing] jurisdiction in a *federal court* in New Jersey." 564 U.S. at 885–86 (emphasis added). The *Nicastro* plurality opinion stands strongly for the *opposite* of the Montana Supreme Court's holding here: Only state legislatures—not Congress—have the power to alter state courts' personal jurisdiction. 564 U.S. at 884 ("personal jurisdiction requires a forum-by-forum, or sovereign-by-sovereign analysis," and "the United States is a distinct sovereign"). And they may do so only subject to the Due Process Clause.

Respondents finally argue that Congress can "authorize state regulations that burden or discriminate against interstate commerce." Br. in Opp. 18 (quoting *Hillside Dairy Inc. v. Lyons*, 539 U.S. 59, 66 (2003)). That is true but irrelevant: Congress's exclusive power to regulate interstate commerce can be delegated to states. But this Court held in *Mississippi University for Women v. Hogan*, 458 U.S. 718, 732–33 (1982), that Congress does *not* have the very different and much more radical power to authorize states to violate the Fourteenth Amendment. Congress could not by statute empower states to deny marriages to same-sex couples, *cf. Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), or to enact race-based admission quotas for public universities, *cf. Gratz v. Bollinger*, 539 U.S. 244 (2003). It similarly cannot authorize state courts to exercise personal jurisdiction that the Due Process Clause forbids by subjecting defendants to "the burdens of litigating in a distant or inconvenient forum."

World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980). Respondents do not even mention *Hogan*, let alone explain the source of Congress' supposed authority to authorize violations of the Fourteenth Amendment.

The decision below rests on both a dreadful misreading of a federal statute as well as an unprecedented and distorted claim about Congress's power to override the Constitution. Those holdings warrant review.

III. This Case Is Extremely Important, And A Grant, Vacate, And Remand Will Not Suffice

Resolution of this case is necessary to defend the integrity of this Court's holdings and to prevent the ongoing deprivation of constitutional rights by the Montana Supreme Court. Unless reversed by this Court, the decision below will provide a blueprint for courts to limit *Daimler* to its facts or to make exceptions based on the cause of action asserted. In FELA cases alone, the opinion will have an enormous warping impact on the railroad industry in Montana and multiple other states. Several hundred FELA cases are filed nationwide every year, and under the Montana Supreme Court's rule they can be filed anywhere a railroad is "doing business."

As described by amicus curiae the Association of American Railroads (at 9), a reversal from this Court of the decision below will have an immediate and potentially dispositive impact in at least 170 pending cases where plaintiffs have pleaded FELA claims in state courts that are not the railroad's state of incorporation or principal place of business, and where the claim did not arise in the state. Those facts, which Respondents do not dispute, render hollow their con-

tention that concerns about forum-shopping are "overblown." Br. in Opp. 21. Just since BNSF filed its petition for certiorari, plaintiffs have served on BNSF a new FELA suit in Montana state court having no connection to Montana, bringing BNSF's total in Montana to 33 (Pet. 25), and another new suit in Illinois state court that has no connection to Illinois.[2] Only this Court can stop the proliferation of these plainly unconstitutional magnet jurisdictions.

To end the abuse, this Court must grant certiorari, not hold this case for any other. The Court has pending a number of petitions for certiorari raising questions related to personal jurisdiction. *See, e.g.*, *Bristol-Myers Squibb Co. v. Superior Court of Cal.*, No. 16-466; *Koninklijke Philips N.V. v. Washington*, No. 16-559; *Mylan Pharm. Inc. v. Acorda Therapeutics Inc.*, No. 16-360. But none of those petitions involves *general* personal jurisdiction, the claim that a federal statute confers personal jurisdiction in state courts, or the occasion to consider Section 56, which is the engine of FELA litigation against the railroad industry. Thus, even were the Court to grant certiorari in one of those cases and rule in favor of the defendant, then grant, vacate, and remand this case, it is highly unlikely that the Montana Supreme Court would reverse its judgment. Without review in this case, the Montana Supreme Court will continue to deny due-process rights, and the Montana state courts will become an increasingly powerful epicenter for litigation having nothing to do with that state.

---

[2] *See Watts v. BNSF Ry. Co.*, No. DV 15-0289 (Mont. Dist. Ct.); *Uhlman v. A.W. Chesterton Co.*, 2016L-001584 (Ill. Cir. Ct. Madison Cnty.).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

Andrew S. Tulumello
Counsel of Record
Michael R. Huston
Chad R. Mizelle
Sean J. Cooksey
Gibson, Dunn & Crutcher LLP
1050 Connecticut Avenue, NW
Washington, DC 20036
(202) 955-8500
atulumello@gibsondunn.com

Counsel for Petitioner BNSF Railway Company

December 13, 2016